

NOT FOR PUBLICATION**UNITED STATES BANKRUPTCY COURT****EASTERN DISTRICT OF CALIFORNIA**

In re:) Case No. 20-25090-B-11
)
NIR WEST COAST, INC. Dba) DC No. RJM-1
NORTHERN CALIFORNIA ROOFING,)
)
)
Debtor(s).)
_____)

**MEMORANDUM DECISION DENYING MOTION TO CONFIRM THE ABSENCE OF THE
AUTOMATIC STAY OF 11 U.S.C. § 362(a)**Introduction

The court has before it a *Motion to Confirm Absence of the Automatic Stay as to Nonbankrupt Codebtor Gregory T. Lynn* filed by Javier Vega Tovar ("Creditor") on his behalf and on behalf of certain class members. Debtor and debtor in possession NIR West Coast, Inc. dba Northern California Roofing ("Debtor") filed an opposition. Creditor filed a reply.

Creditor requests a so-called "comfort order" or, in other words, an order from this court confirming that the automatic stay of 11 U.S.C. § 362(a) is inapplicable to Gregory T. Lynn ("Lynn"). Creditor identifies Lynn as the Debtor's nondebtor codebtor. Creditor's motion is immediately suspect in that it relies almost exclusively on 11 U.S.C. § 105(a). Section 105(a) is a catch-all; however, it does not give the bankruptcy court carte blanche to do whatever it wants to do. See Law v. Siegel, 134 S. Ct. 1188, 1197 (2014). Creditor's motion will be denied without prejudice for the reasons explained below.

The court has reviewed the motion, opposition, reply, and all related declarations and exhibits. The court has also reviewed and takes judicial notice of the docket in this case.

1 See Fed. R. Evid. 201(c)(1). The court has determined this
2 matter may be decided on the papers. See General Order No. 618
3 at p.3, ¶ 3 (E.D. Cal. May 13, 2020) (ordering courthouse closure
4 "until further notice" due to the COVID-19 pandemic and further
5 ordering that all civil matters are to be decided on the papers
6 unless the presiding judge determines a hearing is necessary).
7 The court has also determined that oral argument will not assist
8 in the decision-making process or resolution of the motion. See
9 Local Bankr. R. 9014-1(h), 1001-1(f).

10 The hearing on January 5, 2021, at 9:30 a.m. will be
11 vacated. Findings of fact and conclusions of law are set forth
12 below. See Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 7052,
13 9014(c).

14
15 Background

16 Lynn is a principal of the Debtor. He is also the Debtor's
17 sole shareholder. And he apparently is the Debtor's codebtor.

18 On August 25, 2017, Creditor filed a state court action
19 against the Debtor and Lynn. The state court action seeks
20 damages and restitution for alleged wage theft and banking of
21 hours, among other claims.

22 Prior to this bankruptcy filing, Creditor, Debtor, and Lynn
23 voluntarily settled all claims alleged in the state court action.
24 The parties signed a settlement agreement which the state court
25 approved. The settlement agreement requires the Debtor and Lynn
26 to make certain payments to Creditor and other class members.

27 Creditor asserts that the Debtor and Lynn defaulted under
28 the terms of the settlement agreement. According to Creditor,

1 the default permits the state court to enter an agreed-upon
2 stipulated judgment against Lynn which Creditor requested and the
3 state court tentatively indicated it would enter. However,
4 following the state court's tentative ruling, but before a final
5 hearing on Creditor's state court motion was held, the Debtor
6 filed its chapter 11 petition. The state court judge thereafter
7 directed Creditor to obtain an order from this court that the
8 automatic stay of § 362(a) is inapplicable to Lynn.¹

9
10 Discussion

11 Creditor seeks what is typically referred to as a "comfort
12 order."² More precisely, Creditor seeks an order from this court
13 declaring not that the automatic stay has in some manner
14 *terminated* as to Lynn but, rather, that the automatic stay in

15
16 ¹The court takes judicial notice that, as of the date of
17 this memorandum decision, Lynn is not a debtor under any chapter
18 of the Bankruptcy Code.

19 ²As one court has explained the term:

20 The origins of the term 'comfort order' are elusive,
21 but comfort orders are generally sought as declarations
22 from a bankruptcy judge that the automatic stay has
23 been terminated or else never came into existence with
24 regard to some element of the bankruptcy case. Comfort
25 orders are usually sought so that the movant can
26 proceed with legal action in some other court (such as,
27 in this case, a foreclosure action in state court).
28 The term 'comfort order' does not appear in BAPCPA, but
it is referred to conceptually in § 362(j) of the Code,
which provides that '[o]n request of a party in
interest, the court shall issue an order under
subsection (c) confirming that the automatic stay has
been terminated.' § 362(j) (emphasis added).

In re Ross, 2019 WL 480269 at *3 (Bankr. N.D. Miss. Feb. 6,
2019).

1 this case is *inapplicable* to Lynn. There is a material
2 difference in the distinction.

3 There are very few instances in the Bankruptcy Code where
4 the bankruptcy court may issue an order confirming that the
5 automatic stay is not in effect. These include:

- 6 (1) § 362(b)(22) (no automatic stay as to eviction
7 proceedings);
- 8 (2) § 362(c)(3)(A) (termination of the automatic stay
9 due to one prior bankruptcy filing);
- 10 (3) § 362(c)(4)(A)(ii) (no automatic stay due to serial
11 bankruptcy filings);
- 12 (4) § 362(h)(1) (termination of the automatic stay for
13 failure to comply with duties under § 521(a)(2));
- 14 (5) § 362(j) (confirming under subsection (c) that the
15 automatic stay has been terminated).

16 None of these apply here. The matter before the court does
17 not concern an eviction. It is not the third or fourth time that
18 Lynn has filed a bankruptcy petition. And Lynn is not a debtor
19 which means he has no Bankruptcy Code duties with which he has
20 not complied.

21 Creditor cites no provision of the Bankruptcy Code that
22 directs or authorizes the bankruptcy court to enter an order that
23 declares the automatic stay inapplicable-or otherwise recognizes
24 its absence-to a nondebtor.³ Nevertheless, a number of courts
25 recognize that even when the Bankruptcy Code does not require it,
26 "[t]he [Bankruptcy] Court . . . retains the discretion to enter a
27 comfort order if warranted by the facts." Ross, 2019 WL 480269

28 ³At least one court has questioned its authority to issue
these so-called "comfort orders." In re Rosenblum, 2019 Bankr.
LEXIS 2277 at *6 (Bankr. D. Nev. July 17, 2019).

1 at *3. Here, however, for at least two reasons this court is not
2 convinced that the facts of this case warrant an issuance of the
3 requested "comfort order" even if authority to issue such an
4 order as it pertains to a nondebtor exists.

5 First, if anything, "[a] 'comfort order' is a bankruptcy
6 term of art for an order confirming an *undisputed* legal result,
7 and often is entered to confirm that the automatic stay has
8 *terminated*." In re Hill, 364 B.R. 826, 827 n.1 (Bankr. M.D. Fla.
9 2007) (emphasis added). Not only is the request here not one for
10 an order that the automatic stay has terminated as to Lynn, but,
11 on the record before it the court cannot conclude that the legal
12 result of Creditor's motion is undisputed. In other words, as
13 explained below, Creditor has not demonstrated that he is
14 entitled to the requested "comfort order" as a matter of law.

15 Second, it is true that as a general rule the automatic stay
16 does not protect nondebtors and it protects only debtors,
17 debtors' property, and property of the estate. See 11 U.S.C. §§
18 362(a), 541(a); Advanced Ribbons and Office Prods., Inc. v. U.S.
19 Interstate Distrib., Inc., 125 B.R. 259, 263 (9th Cir. BAP 1991)
20 (citation omitted). However, the Fourth Circuit in A.H. Robins
21 v. Piccinin, 788 F.2d 994 (4th Cir. 1986), cert. denied, 479 U.S.
22 876 (1986), developed an exception to the general rule. Piccinin
23 held that the automatic stay may be extended to a nondebtor if
24 unusual circumstances make the interests of the debtor and the
25 nondebtor inextricably interwoven. Id. at 998-1004 (affirming
26 stay of actions against debtor's officers under a combination of
27 § 362(a), § 105(a), and the court's inherent equitable powers);
28 see also S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc.

1 (In re S.I. Acquisition, Inc.), 817 F.2d 1142, 1147-50 (5th Cir.
2 1987) (extending the § 362(a) automatic stay to action against
3 debtor's alleged alter egos).

4 The Ninth Circuit has not expressly adopted the "unusual
5 circumstances" exception. See Klinkenborg Aerial Spraying and
6 Seeding, Inc. v. Rotorcra Dev. Corp., 690 Fed.Appx. 540 (9th Cir.
7 2017) (citation omitted). At the same time, it has not expressly
8 rejected it either.

9 The Ninth Circuit has declined to apply the "unusual
10 circumstances" exception in three general instances:

- 11 (1) where a nondebtor has obligations that are
12 independent, primary, not derivative of the
13 debtor, Chugach Timber Corp. v. Northern
14 Stevedoring & Handling Co. (In re Chugach Forest
Prods.), 23 F.3d 241, 247 (9th Cir. 1994), and
O'Malley Lumber Co. v. Lockard (In re Lockard),
884 F.2d 1171, 1179 (9th Cir. 1989);
- 15 (2) where it was not raised in the lower court, U.S.
16 v. Dos Cabezas Corp., 995 F.2d 1486, 1492-93 n.3
(9th Cir. 1993); and
- 17 (3) where the automatic stay was not extended in the
18 first instance by the bankruptcy court in exercise
19 of its equity jurisdiction, Rotocraft Dev., 690
Fed.Appx. at 541.

20 The Ninth Circuit has been receptive to the exception in a
21 number of case. For example, in an early opinion it stated that
22 "in the absence of *special circumstances*, stays pursuant to
23 section 362(a) are limited to debtors and do not include
24 non-bankrupt co-defendants." Ingersoll-Rand Fin. Corp. v. Miller
25 Mining Co., 817 F.2d 1424, 1427 (9th Cir. 1987) (emphasis added).

26 Several years later, in Chugach Forest Prods., 23 F.3d 241,
27 the Ninth Circuit suggested that the exception may apply when
28 necessary to "advance the aims of the bankruptcy scheme" or

1 "promote reorganization [or] protect [the debtor's] other
2 creditors[,]” id. at 247, and if necessary to protect the
3 administration of the bankruptcy estate.⁴ Id. at 247 n.6.

4 In Solidus Networks, Inc. v. Excel Innovations, Inc. (In re
5 Excel Innovations, Inc.), 502 F.3d 1086 (9th Cir. 2007), the
6 Ninth Circuit reversed not because the bankruptcy court and the
7 bankruptcy appellate panel applied the exception but because they
8 both applied the exception incorrectly. The court explained:

9 In sum, our usual preliminary injunction standard
10 applies to applications to stay actions against non-
debtors under § 105(a).

11 [. . .]

12 Both the bankruptcy court and the BAP applied incorrect
13 legal standards.

14 [. . .]

15 The BAP treated the ‘unusual circumstances’ doctrine
16 and the usual preliminary injunction standard as
17 separate and distinct bases for affirming the stay.
18 That is error, because the ‘unusual circumstances’
19 doctrine does not negate the traditional preliminary
20 injunction standard. As we have noted, stays under the
21 doctrine, ‘although referred to as extensions of the
22 automatic stay, were in fact injunctions issued by the
administration of the bankruptcy estate.’ Chugach
Forest Prods., 23 F.3d at 247 n. 6 (quoting Patton v.
Bearden, 8 F.3d 343, 349 (6th Cir. 1993)). Indeed,
Piccinin itself applied the usual preliminary
injunction standard in affirming the stay. 788 F.2d at
1008.

23 Id. at 1096.

25 ⁴Such relief would not be inconsistent with American
26 Hardwoods, Inc. v. Deutsche Credit Corp. (In re American
27 Hardwoods), 885 F.2d 621 (9th Cir. 1989), in which the Ninth
28 Circuit concluded that bankruptcy courts have jurisdiction to
enjoin actions that could conceivably have any effect on
administration of reorganization plan. Id. at 624.

1 In Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009), the Ninth
2 Circuit recognized that it would not be improper for the
3 bankruptcy court to extend the automatic stay to a nondebtor
4 through its equity jurisdiction "if the liability of the
5 non-debtor party were to affect the property of the bankruptcy
6 estate, such as by a requirement that the debtor indemnify the
7 non-debtor or by payment of the liability from a director's and
8 officer's insurance policy[.]" Id. at 1093 & n.3 (emphasis in
9 original).

10 Citing Piccinin, the Ninth Circuit Bankruptcy Appellate
11 Panel has also recognized that "[t]he automatic stay may protect
12 nondebtors only under 'unusual circumstances' where the interests
13 of the debtor and the nondebtor are inextricably interwoven."
14 Ripon Self Storage, LLC v. Exchange Bank (In re Ripon Self
15 Storage, LLC), 2011 WL 3300087 at *6 (9th Cir. BAP April 1,
16 2011); see also Hemaratanatorn v. Pasternak (In re MBE Digital,
17 Inc.), 2016 WL 6699313 at *4 n.4 (9th Cir. Nov. 9, BAP 2016) ("We
18 have recognized that the bankruptcy court may extend the
19 automatic stay to nondebtors under the 'unusual circumstances'
20 doctrine, where the interests of the debtor and the nondebtor are
21 inextricably interwoven."). At the same time, the BAP also noted
22 that "any extension of the automatic stay to nondebtors does not
23 occur automatically but requires the filing of an adversary
24 proceeding requesting the bankruptcy court to act under §
25 105(a)." Ripon, 2011 WL 3300087 at *6.

26 The point here is that the "unusual circumstances" exception
27 to the general rule that the automatic stay protects only debtors
28 (and debtors' property and property of the estate) remains viable

1 in the Ninth Circuit if sought through an adversary proceeding.
2 And therein lies Creditor's problem.

3 Creditor recites two critical facts which have the potential
4 to trigger application of the "unusual circumstances" exception
5 in this case: (1) Lynn is the Debtor's codebtor; and (2) Lynn is
6 a principal of the Debtor. Based on those facts alone and the
7 record before it, the court is unable to conclude that Creditor
8 has an undisputed right, if any at all, to the requested "comfort
9 order." Put another way, Creditor has not demonstrated an
10 entitlement to the relief requested in the form of a "comfort
11 order" as a matter of law.

12 Further contributing to Creditor's problem is that
13 Creditor's request for a "comfort order" is effectively a request
14 for declaratory relief made in the context of a watered-down
15 contested matter which lacks the protections of an adversary
16 proceeding or, at a minimum, application of adversary procedures
17 through Bankruptcy Rule 9014(c). See In re Fagan, 559 B.R. 718,
18 724-25 (Bankr. E.D. Cal. 2016); Gray v. CPF Associates, LLC, 614
19 B.R. 96, 107-08 (D. Ariz. 2020). Moreover, whereas Creditor
20 would have the burden in an action for declaratory relief, here,
21 Creditor does not explain (1) the extent of Lynn's codebtor
22 liability, *i.e.*, independent, derivative, or if it would give
23 Lynn some claim against the Debtor or estate property, or (2) the
24 impact, if any, of Lynn's entanglement in state court litigation
25 on the Debtor's reorganization or the administration of the
26 chapter 11 case. The court declines to grant Creditor
27 declaratory relief under these circumstances. Cf. In re Running
28 Horse, LLC, 2007 WL 2669480 at *2 (Bankr. E.D. Cal. 2007)

1 (declining to issue a "comfort order" regarding debtor's interest
2 in property without an adversary proceeding or agreement of all
3 parties).

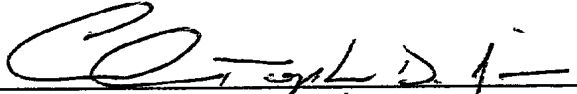
4 At the same time, the Debtor's request for the court to
5 extend the automatic stay to Lynn requires an adversary
6 proceeding or, perhaps, an evidentiary hearing under the auspices
7 of the federal rules of procedure. The Debtor has initiated
8 neither. The Debtor's request for an extension of the automatic
9 stay to Lynn (or more accurately a § 105(a) injunction for Lynn's
10 benefit) will therefore also be denied without prejudice.

11
12 Conclusion

13 For the foregoing reasons, Creditor's motion is denied
14 without prejudice. The hearing on January 5, 2021, at 9:30 a.m.
15 is vacated.

16 A separate order will issue.

17
18 **Dated:** January 04, 2021

19
20 
21 Christopher D. Jaime, Judge
22 United States Bankruptcy Court
23
24
25
26
27
28

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Julie E. Oelsner
400 Capitol Mall 11th Fl
Sacramento CA 95814

Rick Morin
555 Capitol Mall Suite 750
Sacramento CA 95814

Jason M. Blumberg
501 I St #7-500
Sacramento CA 95814